(3)

No. 92-273

Supreme Court, U.S.
FILED
OCT 5 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CALVIN A. ALLEN, Seaman Apprentice,
United States Navy,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

REPLY BRIEF FOR PETITIONER

DWIGHT H. SULLIVAN
Captain, U.S. Marine Corps
Counsel of Record

DAVID P. SHELDON
Lieutenant, Judge Advocate
General's Corps
U.S. Naval Reserve

NAVY-MARINE CORPS APPELLATE
DEFENSE DIVISION
Washington Navy Yard
Building 111
Washington, D.C. 20374-1111
(202) 433-4161

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
ARGUMENT	1
CONCLUSION	3

TABLE OF AUTHORITIES

Cases:

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam)	2
Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183 (D.D.C. 1990)	2-3
Shoemaker v. United States, 147 U.S. 282 (1893)	2
United States v. Coffman, 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam)	2
United States v. Prive, 35 M.J. 569 (C.G.C.M.R. 1992)	1, 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-273

CALVIN A. ALLEN, Seaman Apprentice,
United States Navy,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondent's Brief in Opposition notes that two Courts of Military Review have rejected the issue presented. Brief in Opposition at 4-5. Neither opinion, however, was correctly decided.

In *United States v. Prive*, 35 M.J. 569 (C.G.C.M.R. 1992), the Coast Guard Court of Military Review expressly held that general court-martial judges are officers, not mere employees, of the United States. *Id.* at 572-73. The Coast Guard Court, however, held that Congress is

not bound by the Appointments Clause when exercising its Article I, Section 8, Clause 14 powers to regulate the land and naval forces. *Id.* at 576-77. This holding is inconsistent with this Court's command that "[u]nless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the [Appointments] Clause. . . . No class or type of officer is excluded because of its special functions." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). Thus, *Prive* was wrongly decided.

In *United States v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam), the Navy-Marine Corps Court of Military Review held that the method by which military trial judges are appointed satisfies the Appointments Clause because all of those judges had earlier been appointed and confirmed as military officers. *Id.* at 592. Respondent's argument concerning the merits of petitioner's position also relies on military trial judges' status as commissioned officers. Brief in Opposition at 5-10. This argument, however, misses the whole point of the Appointments Clause. While the trial judge in this case was appointed by the President *as a military officer*, he was not appointed by the President *as a judge*. Judge Haldeman had the authority to decide guilt or innocence and sentence petitioner *not* because Judge Haldeman was a military officer, but because he was filling the office of a general court-martial judge. The *independent* judicial authority which Judge Haldeman and other military trial judges possess is quite different from the structured, accountable authority which other military officers exercise.

Coffman relied in part on *Shoemaker v. United States*, 147 U.S. 282 (1893). *Coffman*, 35 M.J. at 592. This reliance, however, is misplaced. Judge Lamberth emphasizes, "[T]he provision challenged in *Shoemaker* added certain duties to two *offices*; it did not confer additional responsibilities on any particular *officer*." *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Super-*

vision, 732 F. Supp. 1183, 1192 (D.D.C. 1990). *Shoemaker* is entirely irrelevant to the question of how military trial judges are appointed because Congress did not provide that service as a judge is an additional duty of some other *office*. A general court-martial judgeship is not an appurtenance of another position. Rather, it is an office unto itself. Unlike the two military officers at issue in *Shoemaker*, military trial judges do not serve *ex officio*. Thus, *Shoemaker* does not resolve the Appointments Clause issue.

CONCLUSION

Because the petition presents an unresolved constitutional question which affects every case tried by a court-martial, this Honorable Court should issue a writ of certiorari.

Respectfully submitted,

DWIGHT H. SULLIVAN
Captain, U.S. Marine Corps
Counsel of Record

DAVID P. SHELDON
Lieutenant, Judge Advocate
General's Corps
U.S. Naval Reserve

NAVY-MARINE CORPS APPELLATE
DEFENSE DIVISION
Washington Navy Yard
Building 111
Washington, D.C. 20374-1111
(202) 433-4161

October 5, 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 332781 70003